



CONSTITUTIONAL COURT OF SOUTH AFRICA

Ntswaki Joyce Mokone v Tassos Properties CC and Another

Ntswaki Joyce Mokone v Blue Canyon Properties CC

CCT 113/16 and CCT 291/16

Date of hearing: 9 March 2017

Date of judgment: 24 July 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 24 July 2017, at 10h00 the Constitutional Court handed down judgment in an application for leave to appeal concerning whether a right of pre-emption contained in a written lease agreement is renewed automatically when the lease is extended, whether such renewal needs to comply with the formalities prescribed for a sale in the Alienation of Land Act 68 of 1981 (Act), and whether the Court may stay an appeal pending the determination of proceedings pending before the High Court.

In 2004 the applicant, Ms Mokone, entered into a written lease agreement with Tassos Properties CC (Tassos), for an initial period of one year. Ms Mokone has to date been conducting the business of a liquor store on the leased property. Clause 6 of the lease agreement gave Ms Mokone a right of pre-emption. After the effluxion of the initial period of one year, the parties orally agreed to extend the lease for another year and few months. At the end of this extended period, a handwritten entry that read “3/5/06 extend till 31/5/2014 monthly rent R5 500” was made on the front page of the original lease agreement. This endorsement was accompanied by the signature of a representative of Tassos.

On 15 July 2009 Tassos entered into a deed of sale with Blue Canyon CC (Blue Canyon) in terms of which Blue Canyon purchased the property. The property was transferred to Blue Canyon on 1 March 2010. On 27 January 2012 Ms Mokone notified Tassos in writing that she was exercising her right of pre-emption and tendered payment in the sum of R55 886.60 which she understood to have been the price for which Blue Canyon had purchased the property. Tassos refused to offer the property to her. It argued that the right of pre-emption had not been part of the extended lease and was therefore unenforceable. This gave rise to the first of two litigious matters, namely a dispute on a right of pre-emption

Ms Mokone initiated action against Tassos and Blue Canyon in the High Court to set aside the sale and transfer of the property and to compel a sale to her. Alternatively, she sought damages. The basis of her claim was that the right of pre-emption was part of the extended lease agreement, that Blue Canyon had taken transfer well-aware of her right of pre-emption and that she was, therefore, entitled to the reversal of the transfer.

At the instance of the parties, the High Court separated issues and considered only the question whether the endorsement extending the lease had also extended the right of pre-emption. The High Court held that when a lease is renewed “*simpliciter*” (without more), only the terms that are “incidental” to the lessor and lessee relationship are renewed. Terms considered “collateral” to the relationship are not renewed, unless the parties indicate a clear intention to renew them as well. The High Court took the view that rights of pre-emption are collateral terms. It then held that the endorsement extending the lease did not specifically indicate that the parties were renewing the right of pre-emption and that this right had thus not been renewed. Ms Mokone unsuccessfully applied for leave to appeal in the High Court and Supreme Court of Appeal.

In this Court, Ms Mokone advanced the following arguments. First, that the right of pre-emption was material to and an integral part of the written lease agreement and thus formed part of the extended lease agreement. Secondly, and in the alternative, Tassos and Ms Mokone intended to include the right of pre-emption when they extended the initial lease agreement by endorsing the front page of the document. Thirdly, and also in

the alternative, considerations of fairness, equity, and pragmatism should lead to a conclusion that the right of pre-emption was included in the extended lease agreement.

Tassos and Blue Canyon opposed the application and argued that the endorsement extended only the period of the lease and not the right of pre-emption. They argued that Ms Mokone's conduct after the sale of the property did not suggest that she believed she had the right of pre-emption because she had waited more than 18 months after she learned of the sale before notifying Tassos in writing of her intention to purchase the property.

The second litigious matter in this case involved an application by Blue Canyon to the Boksburg Magistrate's Court to evict Ms Mokone. Ms Mokone resisted the application on the grounds that: Blue Canyon's alleged ownership was under challenge in proceedings that were pending before the High Court. In consequence, Blue Canyon had no right to terminate Ms Mokone's occupation. The Magistrate's Court dismissed the eviction proceedings however Blue Canyon later succeeded on appeal before the High Court. Special leave to appeal was refused by the Supreme Court of Appeal.

In this Court, Ms Mokone persisted in the argument that the eviction should be held in abeyance until the action pending before the High Court has been finally determined. Blue Canyon contended that it served no purpose to delay the eviction because the action pending before the High Court is sure to fail. It also argued that because the endorsement that extended the lease was signed only by a representative of Tassos, it was invalid for failure to comply with the formalities stipulated in the Act which requires the signature of both parties. Blue Canyon further argued that, in refusing to stay the eviction, the High Court had exercised its discretion judicially, which meant it was unassailable.

The majority judgment written by Madlanga J (Nkabinde ADCJ, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring) took issue, on the first of the two applications, with the present common law rule that when a term that is collateral to, and not an incident of, the relation of lessor and tenant, such term continues to operate during the period of extension of a lease only if it is clearly indicated that this is what the parties to the lease intended. This Court held that this rule unduly favoured lessors. The majority judgment held that it was unreasonable to expect ordinary lay people to be able to draw a distinction between terms that are "collateral to, and independent of, the lessor and lessee relation" and those that are incidental to this relationship. The Court held that in extending their lease, parties – without stipulating anything more – provide that all the terms of the lease, including terms that are collateral, and not incidental, to the lease are extended.

On the second application, the majority held that the formalities in the Act apply to alienations of land as defined in the Act. On the definition, a right of pre-emption, this

did not constitute an alienation of land. Consequently, it did not have to comply with the formalities. The argument that the right of pre-emption was invalid for lack of signature by Ms Mokone on the extending endorsement was thus misconceived. In this regard, the majority overruled the judgment of *Hirschowitz v Moolman*.

The majority also held that section 173 of the Constitution empowered the Constitutional Court to hold the appeal relating to Ms Mokone's eviction in abeyance pending the determination of the issues left pending before the High Court in the right of pre-emption dispute.

In a concurring judgment, Froneman J identified three ways in which the majority judgment develops the law. He agreed with the first two developments, which emphasised substance, rather than the form, of legal agreements in the process of interpretation and the confirmation courts use in exercising their equitable discretion to stay proceedings in one matter until determination of a material legal point in another. In relation to the latter development, he stressed that the common law has long developed in accordance with notions of fairness and justice and suggested that, under the Constitution, judges should engage in this exercise openly.

Froneman J disagreed with the third development of the law that he identified in the majority judgment. He considered it unnecessary to overrule *Hirschowitz v Moolman* because, in his view, it dealt with a kind of right of pre-emption that differed from the right of pre-emption in the present case.